(1)

NO.

In the
Supreme Court of the United States

OCTOBER TERM, 1991

281-300 JOINT VENTURE
Petitioner

vs.

ROBERT ONION, THE RESOLUTION TRUST CORPORATION as Receiver For SAN ANTONIO SAVINGS ASSOCIATION,
THE RESOLUTION TRUST CORPORATION as Conservator
For SAN ANTONIO SAVINGS ASSOCIATION, F.A.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it proper to dismiss a case on prudential grounds as being moot when the relief sought is other than monetary damages?

2. Can the court enjoin the Resolution Trust Corporation in its capacity as conservator of a savings institution, from conducting a foreclosure sale when the savings institution, acting alone, could be enjoined?

LIST OF PARTIES

The names of all parties to this proceeding appear in the caption of the case.

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STATUTES & RULES

STATUTES & RULES (continued)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, 281-300 Joint Venture, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled proceeding on June 12, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 938 F.2d 35, and is reprinted in the Appendix at App. 1-App. 10.

The memorandum decision of the United States District Court for the Western District of Texas, San Antonio Division (Garcia, D.J.) has not been reported. It is reprinted in the Appendix at App. 14-App. 15.

JURISDICTION

Petitioner originally filed suit in the 73rd Judicial District Court of Bexar County, Texas, in June of 1989. In July of 1989 the FSLIC as Conservator for San Antonio Savings Association removed the case to the United States District Court for the Western District of Texas, San Antonio Division, pursuant to 12 U.S.C. § 1730(k)(1)(C). On December 1, 1989, the district court denied Petitioner's Motion to Enjoin the RTC as Conservator for San Antonio Savings Association, F.A. and Robert Onion from foreclosing upon Petitioner's property. (Reprinted in the Appendix at App. 16-App.17). On July 31, 1990, the district court, based on prudential grounds, dismissed Petitioner's claims as being moot.

On Petitioner's appeal, the Fifth Circuit on July 12, 1991 affirmed the judgment of the district court. Petitioner filed a Petition for Rehearing which the Fifth Circuit overruled on July 15, 1991. (Reprinted in the Appendix at App. 11).

Jurisdiction of this Court to review the judgment of the Fifth Circuit is evoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

(1) 12 U.S.C. § 1821(j)

(j) Limitation on court action

Except as provided in this section, no court

may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservtor or a receiver.

(2) 12 U.S.C. § 1464(d)(6)(c)

(c) Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

(3) 12 U.S.C. § 1821(d)(2)(B)

(B) Operate the institution

The Corporation may, as conservator or receiver—

(i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution;

(iii) perform all functions of the institution in the name of the institution which is consistent with the appointment as conservator or receiver; and

(iv) preserve and conserve the assets and property of such institution.

(4) 12 U.S.C. § 1821(d((2)(D)

(D) Powers as conservator

The Corporation may, as conservator, take such action as may be—

(i) necessary to put the insured depository institution in a sound and solvent condition; and

(ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.

STATEMENT OF THE CASE

281-300 Joint Venture is a Texas Joint Venture which owned approximately 296.69 acres of land in Bexar County, Texas. On December 28, 1984, 281-300 Joint Venture and San Antonio Savings Association (SASA) entered into a Loan Agreement wherein SASA agreed to loan $8,100,000.00 so that the property could be developed. At this time the property was encumbered by two superior liens known as the Herzberg note (a "wrap-around" note including four notes payable to various Steubling family members) and the Mid-America note.

On December 28, 1987, 281-300 Joint Venture and SASA entered into a modification and rearrangement of the SASA loan by the execution of a Loan Agreement and an Extension and Modification of the Real Estate Note and Lien. By this loan agreement, SASA agreed to make

advances to or for the benefit of 281-300 Joint Venture for principal and interest payments on the underlying notes (the Herzberg and Mid-America notes) and for 62% of each interest payment due on the SASA note. The loan agreement further obligated 281-300 Joint Venture to pay 38% of the interest payment on the SASA note with funds other than the proceeds of the loan.

SASA failed to make the annual payment on the Herzberg note which was due on January 2, 1989, even after 281-300 Joint Venture demanded such payment be made in accordance with the Loan Agreement. Thereafter, the holder of the Herzberg note declared the note in default and posted the property for foreclosure. The need for this foreclosure sale was obviated by SASA's payment of the Herzberg note in full just four days before the sale was to take place. This breach of the loan agreement by SASA resulted in SASA being elevated to a first lien position, caused injury to 281-300 Joint Venture's credit reputation and standing in the community, and shortened the term of the Herzberg note.

SASA claimed for the first time in the district court that 281-300 Joint Venture had breached the agreement prior to its own breach because of a failure to make interest payments. The quarterly interest payments that were due from 281-300 Joint Venture varied from quarter to quarter. Thus, SASA had to compute the amount due at the end of each quarter and send an invoice to 281-300 Joint Venture. The invoice for the December 31, 1988 interest payment was received by 281-300 Joint Venture on January 6, 1989, and was due by January 15, 1989. On January 9, 1989, 281-300 Joint Venture sent a check for $49,535.55 to SASA in payment of the interest due. This check was received and negotiated by SASA on January 19, 1989. This was the standard course of dealing between the parties. Thus, at

the time SASA breached the loan agreement, 281-300 Joint Venture was current on its obligation and not in breach of the agreement.

On June 30, 1989, 281-300 Joint Venture filed its original petition in the 73rd Judicial District Court for Bexar County, Texas. On the same day, Judge John Cornyn issued a temporary restraining order restraining SASA and its substitute trustee, Robert F. Onion, from conducting a foreclosure sale on the property scheduled for July 4, 1989, and set a hearing on the application for temporary injunction for July 13, 1989.

On July 12, 1989, the day before the temporary injunction hearing, the FSLIC, *as conservator* of SASA, intervened and removed the case to the United States District Court for the Western District of Texas, San Antonio Division. Also on July 12, 1989, the FSLIC was appointed *as receiver* for SASA for the purpose of liquidation; a new federal savings and loan association, San Antonio Savings Association, F.A. ("SASA, F.A.") was organized; and the FSLIC was appointed *conservator* for SASA, F.A. On July 13, 1989, SASA, F.A. supposedly acquired most of SASA'a assets, including the subject note, deed of trust, and loan agreement, with the FSLIC Corporate purchasing the remaining assets. All the liabilities of SASA stayed with the FSLIC Receiver except the secured, deposit and tax claim liabilities, which were assumed by SASA, F.A. After FIRREA abolished the FSLIC, the RTC succeeded to the FSLIC as receiver for SASA and as conservator for SASA, F.A. Thus, after the dust settled, the defendants in this case became the RTC as receiver for SASA, the RTC as conservator for SASA, F.A. and Robert F. Onion.

Soon after this case was removed, the property was again posted for foreclosure by the RTC acting as con-

servator for SASA, F.A. This sale did not take place because 281-300 Joint Venture filed a Chapter 11 bankruptcy petition. On October 31, 1989, the bankruptcy court granted a motion to lift stay filed by SASA, F.A., leaving no impediment to proceeding to a foreclosure sale. SASA, F.A. did just that and on November 13, 1989, posted the property for foreclosure on December 5, 1989.

In response, 281-300 Joint Venture filed a motion for preliminary injunction on November 17, 1989, seeking to enjoin SASA, F.A. and Robert Onion from selling its property. On December 1, 1989, the district court denied this motion finding that it was prohibited by § 212(j) of FIRREA from taking any action to restrain or affect the powers or functions of the RTC as conservator of SASA, F.A. On December 5, 1989, the lien was foreclosed.

Hence, the crux of the suit brought by 281-300 Joint Venture was to recover monetary damages caused by SASA's breach of the loan agreement, to obtain a declaration of the rights of the parties under that agreement, an order setting aside the foreclosure sale and equitable relief which would have restored the status quo as it existed prior the foreclosure sale.

The district court disposed of the entire case on July 30, 1990, when it granted the RTC's motion to dismiss on prudential grounds. The district court held that there would never be any assets with which to satisfy a judgment. The district court also dismissed as moot, the claims against Robert F. Onion, the substitute trustee, since the property had been sold.

281-300 Joint Venture appealed to the Fifth Circuit claiming that the district court erred in not granting the preliminary injunction and in dismissing the case on

prudential grounds without allowing a trial on the merits. The Fifth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I.

Dismissal because of mootness on prudential grounds is not permissible when equitable relief is sought and available

The primary issue in this case is whether the claims brought by 281-300 Joint Venture wherein the relief sought was other than monetary damages were moot so as to justify dismissal without a trial on the merits merely because there would never be any assets to satisfy a judgment for monetary damages.

The doctrine of mootness has a two-fold nature. Initially, the concept of mootness defines constitutionally minimal conditions for the invocation of federal judicial power. *Franks v. Bowman Transportation Company, Inc.*, 96 S. Ct. 1251, 1259 (1976). Mootness, as with all concepts of justifiability, must be derived from the fundamental policies informing the "cases or controversies" limitation imposed by Article III of the Constitution. *Id.*

Article III limits federal court jurisdiction to cases and controversies. Thus, an Article III court has no jurisdiction in the absence of a case or controversy. This case - or - controversy limitation serves two complimentary purposes. *Flast v. Cohen*, 88 S. Ct. 1942, 1949 (1968). It limits the business of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and it defines the "role assigned to the judiciary in

a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."*Id.*

Within constitutional confines, a case is moot in two situations. First, when the issues presented are no longer live. *Powell v. McCormack,* 89 S. Ct. 1994, 1951 (1969). With respect to whether there is a live case or controversy, this Court has explained:

> The duty of this Court, as of every judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions...it necessarily follows that when...an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to a formal judgment...

Mills v. Green, 16 S. Ct. 132, 133 (1895).

In deciding whether there is a live case or controversy the essential question is thus, whether the court can fashion relief that will have an impact on the parties and redress the wrong of which the plaintiff complains. *Iron Arrow Honor Society v. Heckler,* 104 S. Ct. 373, 374 (1983) (per curiam).

The second situation is when the parties lack a legally cognizable interest in the outcome. *Powell,* 89 S. Ct. at 1951. This is also referred to as the "personal stake" requirement. *United States Parole Commission v. Geraghty,* 100 S. Ct. 1202, 1208 (1980); *Baker v. Carr,* 82 S. Ct. 691, 703 (1962). This requirement relates to the first purpose of the case - or - controversy doctrine — limiting judicial power to disputes capable of judicial resolution. *Geraghty,*

100 S. Ct. at 1208-09. Here there is no question that 281-300 Joint Venture had a personal stake in this dispute. The dispute revolved around 296 acres of land owned by the joint venture which was eventually taken away from it without justification.

The trial court did not dismiss the claims of 281-300 Joint Venture for mootness based upon lack of subject matter jurisdiction. The controversy continued and the court could have granted or denied the relief sought in a fashion that would have impacted the parties and/or redressed the alleged wrongs. 281-300 Joint Venture, in addition to claims for monetary damages, sought a declaration of the parties rights under a loan agreement, an order setting aside the foreclosure sale and equitable relief that would have restored the status quo as it existed prior to the foreclosure sale. Of course, the absence of "assets" would have no affect on the granting of this additional relief.

In addition to mootness principles mandated by Article III, the courts have utilized discretionary mootness doctrines to avoid deciding the case on the merits. *Franks v. Bowman Transportation Company, Inc.,* 96 S. Ct. at 1260 n. 8; *In re AOV Industries, Inc.,* 792 F.2d 1140, 1147 (D.C. Cir. 1986). It was this doctrine the court utilized to dismiss 281-300 Joint Venture's claims. The difference between the constitutional and prudential doctrines of mootness is not readily apparent and the courts have not been able to draw clear lines between the two. *Division 580, Amalgamated Transit Union v. Central New York Regional Transportation Authority,* 578 F.2d 29, 33 (2nd Cir. 1978). *See also* 13A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3533.1, at 226 (2nd. ed. 1984). For example, the primary factor in determining whether to dismiss a case as moot on discretionary or prudential grounds is the feasibility or utility of effective relief should

a litigant prevail. *AOV Industries, Inc.*, 792 F.2d at 1147-48; *FSLIC v. Locke,* 718 F. Supp. 573, 587 (W.D. Tex. 1989). This is very similar to the test for determining whether a case or controversy is live. That test, as described above, focuses on whether the court can fashion relief that will impact the parties and redress the wrongs complained of.

The district court's dismissal of 281-300 Joint Venture's claims was improper whether viewed in light of the Article III requirement for a "live" case or controversy or based on prudential principle of requiring the possibility of effectual since equitable relief was sought and was available.

One of the first cases out of the courts of appeal to recognize the possibility of dismissing claims involving the FSLIC, FDIC, or RTC on prudential grounds for being moot was *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir. 1989). In that Triland sued Sunbelt Savings alleging a violation of Texas usury laws. Soon thereafter Sunbelt was declared insolvent and the FSLIC was appointed as receiver. The FSLIC claimed that Triland's claims were moot and should be dismissed because Sunbelt had no assets to satisfy a judgment against it. The Fifth Circuit reversed the dismissal by the district court because the record failed to establish that there would never be a possibility of satisfying a favorable judgment. However, the court did recognize that dismissal on prudential grounds would be permissible if there would "never be any assets with which to satisfy a judgment against Sunbelt Savings nor any means to collect from any other party, including the FSLIC." *Triland Holdings,* 884 F.2d at 208. *See also Cox v. Sunbelt Savings Association of Texas,* 896 F.2d 957 (5th Cir. 1990) where court again reversed a dismissal on prudential grounds because there was no proof offered as to the value of Sunbelt's assets.

Prior to the *Triland* decision the district courts in the Fifth Circuit were split on this issue of dismissal on prudential grounds. Some courts determined that the claims were moot because they were worthless since the failed institution would never have any assets to satisfy the claims of general creditors. *Stevenson v. FSLIC*, 716 F. Supp. 981 (S.D. Tex. 1989); *FSLIC v. Locke*, 718 F. Supp. 573 (W.D. Tex. 1989). Other courts rejected the mootness argument as they were not convinced that there would never be any assets recovered by the receivership estate upon which a judgment might be executed. *FSLIC v. Desert Inn Co.*, 757 F. Supp. 779 (W.D. Tex. 1989); *Southern Classical Homes v. FSLIC*, No. CA3-88-2273-D (N.D. Tex. May 26, 1989).

After the *Triland* decision most of the district courts fell in line with the Fifth Circuit. *See FDIC v. Browning*, 757 F. Supp. 772 (N.D. Texas 1989); *AmWest Savings Ass'n v. Farmers Market of Odessa, Inc.*, 753 F. Supp. 1339 (W.D. Tex. 1990); *Morgan v. Heights Savings Ass'n*, 741 F. Supp. 620 (E.D. Tex. 1990). One court, however, refused to utilize the mootness theory to short-circuit the system of determining claims on their merits. *FDIC v. Texas Country Living, Inc.*, 756 F. Supp. 984 (E.D. Tex. 1990). In that case, Judge Justice refused to conclude that there would never be any assets to satisfy a judgment or that all potential forms of relief were permanently precluded. The court reached this result even in light of the facts that Home Savings and Loan (HSA) was insolvent, its assets were transferred to another lending institution, the FDIC - Receiver assumed HSA's liability and had no assets of its own, and FIRREA provides that the FDIC's maximum liability as receiver as the amount that the claimant would have received if HSA had been liquidated (which would have been zero in this case). *Id.* at 991. Even if there would never be any assets to satisfy a judgment, Judge Justice

suggested that the FDIC - Receiver accept a default judgment rather than dismissing the claims. *Id.* at 992. Not only would this be cheaper and quicker than seeking dismissal, it would put the risk on the FDIC that its forecast of the future will prove incorrect rather than on those with claims against it. *Id.*

The one characteristic shared by all the cases both prior to and after *Triland* that is not present in this case is that the claims asserted against the insolvent institution were solely for monetary damages. In contrast to those cases 281-300 Joint Venture, has sought equitable relief and an order setting aside the foreclosure sale. While there may be some justification for dismissing claims for monetary damages when there is no possibility of recovery *ever,* this reasoning has no basis in law or logic when the relief sought is the kind 281-300 Joint Venture is seeking here.

The Fifth Circuit in *Triland* concluded that before dismissal on prudential grounds is warranted, *all* potential forms of relief must be permanently precluded. 884 F.2d at 208. Similarly, a case or controversy will no longer be live only when the court cannot grant relief that will have an impact on the parties and redress the wrong complained of. *Iron Arrow Honor Society v. Heckler,* 104 S. Ct. 373, 374 (1983). Neither of these conditions were present in this case and dismissal was not warranted.

The wrong complained of by 281-300 Joint Venture was that SASA breached the loan agreement by failing to make the payment due to the superior lien holder. The property was then posted for foreclosure; a foreclosure which was avoided only by SASA paying off the entire indebtedness to the senior lienholder. As a result of its breach, SASA caused damage to 281-300 Joint Venture's

credit reputation and standing in the community and shortened the terms of the senior lienholder's note. Even though SASA was in breach of the loan agreement, it attempted to foreclose on the property, but was enjoined by the state district court from doing so. Eventually, SASA, F.A. was allowed by the federal district court to foreclose the property even though SASA, its predecessor in interest, had breached the loan agreement. This conduct runs counter to established Texas law that a party in default cannot recover under that contract for the other party's subsequent breach. *Martin v. Xarin Real Estate, Inc.*, 703 F.2d 883 (5th Cir. 1983); *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685 (Tex. 1981).

In light of these facts and law, 281-300 Joint Venture sought to have the foreclosure sale set aside and to have the status quo restored. The court, by placing the parties in their pre-foreclosure positions, would have granted relief affecting the parties and redressing the wrongs complained of even *without granting monetary relief.* Thus, the district court should not have dismissed the claims of 281-300 Joint Venture on prudential grounds.

II.

Courts can enjoin the RTC from conducting a foreclosure sale when all the criteria for such an injunction are established

Rule 65(a), Fed. R. Civ. P., provides the mechanics for obtaining a preliminary injunction, which is designed to protect the rights of the parties pending a final determination of those rights. The purpose of the preliminary injunction is to preserve the status quo of the subject matter of the lawsuit so that irreparable injury may be avoided. *Compact Van Equipment Co. v. Leggett & Platte, Inc.*, 566 F.2d

952 (5th Cir. 1978). 281-300 Joint Venture sought to enjoin SASA, F.A., when it was being operated by the RTC-Conservator, from selling its property until the dispute between the parties could be resolved. The district court refused to do so without considering whether 281-300 Joint Venture established the criteria necessary for the issuance of an injunction. The Fifth Circuit concluded that this result was not improper based on 12 U.S.C. § 1821(j) which states that no court may take any action to restrain or affect the exercise of powers or functions of the RTC as receiver or conservator.

Prior to the enactment of this provision, 12 U.S.C. § 1464(d)(6)(c), which applied to the FSLIC, contained virtually identical language. According to this Court, 12 U.S.C. § 1464(d)(6)(c) did not give the FSLIC power to adjudicate claims against insolvent savings and loan institutions but "simply prohibits courts from restraining or affecting FSLIC's exercise of those receivership 'powers and functions' that have been granted by other statutory sources." *Coit Independence Joint Venture v. FSLIC,* 109 S. Ct. 1361, 1369 (1989).

The powers and functions given to the RTC as conservator of SASA, F.A. are now found in 12 U.S.C. § 1821. Once the RTC was appointed as conservator of SASA, F.A., it was entitled to take over the assets and operate SASA, F.A. "with all the power of the members or shareholders, the directors, and the officers" of SASA, F.A. 12 U.S.C. § 1821(d)(2)(B)(i). In effect, the RTC stepped into the shoes of SASA, F.A. and was authorized to conduct all of its business but only with the same powers which the members, shareholders, directors, or officers have.

Under certain circumstances SASA, F.A. would be

permitted to foreclose under a deed of trust and sell property to satisfy an obligation owed to it. However, if all the criteria are established supporting an injunction, SASA, F.A. would not be permitted to sell the property until the dispute between the parties was resolved in its favor. Thus, it cannot be a basic function of SASA, F.A. nor the RTC as conservator to foreclose on property when the owner/plaintiff shows that (1) there is a substantial likelihood that the plaintiff will prevail on the merits of the case, (2) that there exists a substantial threat that the plaintiff will suffer irreparable injury if the sale occurs, (3) that the threatened injury outweighs the threatened harm the injunction may do to SASA, F.A. or the RTC, and (4) that granting the injunction will not disservice the public interest. *Libertarian Party of Texas v. Fainter,* 741 F.2d 728 (5th Cir. 1984); *see also Riverside Park Realty Co. v. FDIC,* 465 F. Supp. 305 (M.D. Tenn. 1978) (court discusses standards for injunctions in deciding whether to enjoin RTC from selling property).

Another function of the RTC as conservator is to "collect all obligations and money due the institution." 12 U.S.C. § 1821(d)(2)(B)(ii). The operative words are "due the institution." Prior to the appearance of the Conservator in this case a dispute arose between 281-300 Joint Venture and SASA. The joint venture claimed SASA breached the Loan Agreement and committed acts harmful to the joint venture. There was a dispute over how much, if any, money was due to SASA.

The RTC Conservator entered the fray and unilaterally decided, without any judicial review or determination, that all the money it said was due was in fact due to SASA, F.A. It then foreclosed the lien on the subject property even though SASA, F.A. would have been prevented from doing so independent of the Conservator.

Thus the Conservator, without any special need to act quickly or decisively, [1] short-circuited the legal process which is designed to adequately protect the rights and property of those like 281-300 Joint Venture. The RTC as Conservator became judge and jury and took the joint venture's property before it was determined how much money, if any, was due to SASA, F.A. While Congress has given the FDIC and the RTC broad powers, it has not created a fourth branch of government beyond the scrutiny of the law. Accordingly, the RTC should not be permitted to be the judge of the propriety of its own conduct. *See Rosa v. Resolution Trust Corp.*, 752 F. Supp. 1231, 1236 (D.N.J. 1990).

The Fifth Circuit also determined that enjoining the RTC is impermissible because of the need to enable it to act quickly and decisively in reorganizing, operating, or dissolving a failed institution. While the need to act quickly may be a concern of the Receiver this is not so for the Conservator. The Receiver must act quickly and decisively when an institution fails so as to protect the depositors to the greatest extent possible. This concern for quick action is not present with the Conservator. The Conservator steps into the shoes of the members, shareholders, directors, and officers of an institution in order to operate that institution. Its purpose is not to liquidate, but to make the institution sound and solvent. 12 U.S.C. § 1821(d)(2)(B)(i); 12 U.S.C. § 1821(d)(2)(D)(i).

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[1] Significantly the RTC has not indicated that it had any potential purchasers of the property who were merely awaiting for the RTC to come into possession of the property. Indeed, the RTC still owns the property. By acting "quickly and decisively" the RTC foreclosed upon the property but, of course, received no money because it merely reduced the alleged indebtedness by the amount it bid for the property. Thus, the RTC has not collected any money as a result of its conduct - nor has it sold the property. The status quo could have been maintained without detriment to the RTC.

In this case, immediately after SASA was declared insolvent and the FSLIC appointed as Receiver, a new entity was formed called SASA, F.A. Most of SASA's assets were transferred to SASA, F.A. and the FSLIC was appointed as Conservator for SASA, F.A. in order to operate this new institution. In its role as Conservator for SASA, F.A., the FSLIC, and later the RTC, has no functional difference from the members, shareholders, directors, and officers of any other newly created federal savings bank. Its purpose is to operate the institution with the hope of making it successful. Clearly, SASA, F.A., absent a conservatorship, could have been enjoined from conducting the foreclosure sale. *See Bean v. Independent American Savings Ass'n,* 838 F.2d 739 (5th Cir. 1988). Since there is not a concern for quick, decisive action on the part of the Conservator, a court should be allowed to enjoin the RTC as Conservator as it could SASA, F.A.

Since the RTC could have been enjoined from selling 281-300 Joint Venture's property, the Fifth Circuit should have considered whether the criteria there for were established. These criteria are as follows:

(A) Irreparable Injury

To show irreparable injury if the foreclosure sale were not enjoined, 281-300 Joint Venture did not have to demonstrate inevitable and irreparable harm. All that is required is a showing of significant threat of injury, that the injury is imminent, and that money damages would not fully repair the harm. *Humana, Inc. v. Jacobson,* 804 F.2d. 1390, 1394 (5th Cir. 1986). The evidence at the hearing showed that 281-300 Joint Venture had title and possession of the property and that if foreclosure were allowed, 281-300 Joint Venture would be deprived of both. Consequently, as a matter of law, any legal remedy 281-300 Joint

Venture might have had was inadequate. *Anderson Oaks (Phase I) Limited Partnership v. Anderson Mill Oaks, Ltd.*, 734 S.W.2d 42 (Tex. App.—Austin 1987, no writ). This is true since each and every piece of real estate (including this one), is unique. *Home Savings of America v. Van Cleave Development Co., Inc.*, 737 S.W.2d 58, 59 (Tex. App.—San Antonio 1987, no writ).

At the hearing 281-300 Joint Venture showed that it would suffer irreparable injury because the foreclosure would terminate all of its rights in the property, would tarnish its financial reputation, and would diminish its borrowing capacity. *Guardian Savings & Loan Ass'n v. Williams*, 731 S.W.2d 107 (Tex. App.—Houston [1st Dist.] 1987, no writ). 281-300 Joint Venture also presented evidence that the property was worth considerably more than the debt and that a substantial loss in its equity would result if the foreclosure sale was allowed. *Home Savings of America v. Van Cleave Development Co., Inc.*, 737 S.W.2d at 59.

(B) Success on the merits

A second prerequisite for an injunction is to show a substantial likelihood that 281-300 Joint Venture will prevail on the merits. This requires the presentation of a *prima facie* case rather than showing certainty to win. *Congress of Racial Equality v. Douglas*, 318 F.2d 95 (5th Cir.), *cert. denied*, 374 U.S. 829 (1963); 11 Wright & Miller, Federal Practice & Procedure § 2948 at 452 (1973). Texas courts state this requirement as a probable right of recovery rather than establishing that the plaintiff will prevail. *Trangart Co. of Texas v. Robertson Transportation*, 152 Tex. 551, 261 S.W.2d 549 (1953).

281-300 Joint Venture presented evidence that

SASA failed to make the annual payments under the Herzberg note when it became due as it was obligated to do under the loan agreement. As a result of SASA's breach of the loan agreement, the holder of the Herzberg note declared it due and payable and posted the property for foreclosure. This note was paid in full by SASA prior to its original maturity date in order to avoid foreclosure. This conduct by SASA was designed to elevate it to a first lien position, thereby improving the loan to value ratio upon SASA's financial records at the expense and injury to 281-300 Joint Venture's financial reputation and borrowing capacity.

In the district court, the RTC asserted that 281-300 Joint Venture could not prevail on a breach of contract theory because it had breached the loan agreement by not paying the January 1989 interest payment. However, the evidence established that the amount of interest due varied each quarter. Thus, at the end of the quarter SASA would compute the interest and invoice 281-300 Joint Venture for payment due within a couple of weeks. This typical procedure was followed in January 1989 with the payment being received and accepted by SASA on January 19, 1989. This normal course of conduct did not meet with any opposition by SASA and did not amount to a breach of contract.

The RTC also argued that 281-300 Joint Venture was estopped by the *D'Oench Duhme* doctrine to bring an action for breach of contract. This rule of estoppel precludes 281-300 Joint Venture from asserting against the RTC defenses or claims based upon secret or unrecorded side agreements that alter the terms of the loan agreement. *Campbell Leasing, Inc. v. FDIC*, 901 F.2d 1244, 1248 (5th Cir. 1990).

281-300 Joint Venture's breach of contract claim,

however, did not rely on side agreements that were not contained in SASA's files nor on oral representations that could not have been known to the RTC. The contractual duty of SASA was reduced to writing and was in SASA's relevant files. Therefore, an action for breach of the loan agreement cannot be estopped by the *D'Oench Duhme* doctrine. *Royal Bank of Canada v. FDIC*, 733 F. Supp. 1091, 1098 (N.D. Tex. 1990); *Howell v. Continental Credit Corp.*, 655 F.2d 743, 746-47 (7th Cir. 1981).

The RTC also argued that the federal holder in due course doctrine barred 281-300 Joint Venture's recovery for breach of contract. This doctrine developed under federal common law bars the makers of promissory notes from asserting personal defenses to notes acquired by the FDIC in a purchase and assumption transaction. *Campbell Leasing*, 901 F.2d at 1248. This doctrine is inapplicable to this case because 281-300 Joint Venture was not asserting any defenses to the note as it is a non-recourse note.

The RTC, furthermore, cannot be a holder in due course under this doctrine because the note is non-negotiable. *Sunbelt Savings v. Montross*, 923 F.2d 353 (5th Cir. 1991) (pending on rehearing). In order to be a holder in due course, the RTC must of course, be a *holder*. A holder is "a person who is in possession of...an *instrument*...drawn, issued or endorsed to him or to his order or to bearer or in blank." Tex. Bus. & Com. Code Ann. § 1.201(20) (emphasis added).

An "instrument" is defined as a negotiable instrument, which in turn is a note that "contains an unconditional promise or order to pay a sum certain in money..." Tex. Bus. & Com. Code Ann. § 3.102(a)(5), § 3.104(a).

The subject note fails to meet the requirements of a

negotiable instrument because it does not call for payment of a sum certain in money. The note is for $8,100,000.00 "or so much thereof as may be advanced." This provision makes the note non-negotiable. *Resolution Trust Corp. v. Oaks Apts. Joint Venture*, 753 F. Supp. 1332, 1337 n. 2 (N.D. Tex. 1990); *In re Hipp, Inc.*, 71 B.R. 643, 649 (Bankr. N.D. Tex. 1987), *vacated and remanded on other grounds*, 859 F.2d 374 (5th Cir. 1988).

The note is non-negotiable also because the interest payable cannot be computed without reference to an outside source. Rather than stating a specific interest rate, the note provides a variable interest rate tied to a fluctuating prime rate of a defunct institution. Thus the note is non-negotiable. *Montross*, 923 F.2d at 356; *Gibbs v. Bank One, Texas, N.A.*, ____ S.W.2d ____, No. 05-90-01562-CV (Tex. App.—Dallas, September 5, 1991) (slip opinion reprinted in appendix at App. 18-App. 25); *Lexington Ins. Co. v. Gray*, 775 S.W.2d 679, 682 (Tex. App.—Austin 1989, writ denied). *See also* Tex. Bus. & Com. Code Ann. §§ 3.106, comment 1: "The computation [of interest] must be one which can be made from the instrument itself without reference to any outside source..."; and *Doyle v. Trinity Sav. & Loan Ass'n*, 869 F.2d 558, 560 (10th Cir. 1989).

Because the subject note is not a negotiable instrument the RTC cannot be a holder in due course and to grant such status to the RTC would be counter to all established commerical contract law and beyond the expectations of 281-300 Joint Venture. Additionally, it would also bestow a benefit upon the RTC and SASA, F.A. by changing the nature of the assets received from SASA and enhancing its value. *Montross*, 923 F.2d at 356.

Accordingly, the evidence presented by 281-300 Joint Venture shows a substantial likelihood that it will

prevail on the merits of its cause of action for breach of the loan agreement. *Home Savings of America v. Van Cleave Development Co., Inc.,* 737 S.W.2d at 60.

(C) Balancing the losses

To satisfy the third prerequisite for injunctive relief, the irreparable harm to 281-300 Joint Venture must be greater than the harm an injunction could cause to SASA, F.A. and the RTC. *Sierra Club v. Block,* 614 F. Supp. 134, 137 (E.D. Tex. 1985). The evidence showed that the irreparable injury to 281-300 Joint Venture would be termination of all ownership and possession rights of the property, loss of equity, and loss of property value greatly in excess of the debt. SASA, F.A., however, would experience little or no injury. If SASA, F.A. prevails at trial, it still can foreclose and acquire the property. At most, the only harm to SASA, F.A. is the delay in insisting upon a trustee sale. *Anderson Oaks (Phase I) Limited Partnership v. Anderson Mill Oaks, Ltd.,* 734 S.W.2d at 45.

(D) Service of public interest

The focus of a final prerequisite is on whether the public interest might be furthered or injured by the injunction. *United States Steel Corp. v. United Mine Workers of America,* 519 F.2d 1236, 1247 (5th Cir. 1975), *cert. denied,* 428 U.S. 910 (1976). The public interest would be best served by the issuance of a preliminary injunction to insure that the property was not taken from 281-300 Joint Venture without justification and without allowing it an adequate remedy at law. Property rights are highly stressed in Texas as evidenced by the strict rules regarding the taking of property through non-judicial foreclosures. *See Houston First American Savings v. Musick,* 650 S.W.2d 764 (Tex. 1983); *Odgen v. Gibraltar Savings Ass'n,* 640 S.W.2d 232

(Tex. 1982).

Since 281-300 Joint Venture offered evidence establishing all the criteria for granting injunctive relief, SASA, F.A. could have and should have been enjoined from selling the property at foreclosure. Since the rights of the RTC as conservator cannot exceed those of SASA, F.A., the RTC should also have been prevented from selling the property.

(E) The refusal to restrain the RTC violated constitutional rights

The district court's refusal to grant the injunction amounted to an unconstitutional denial of 281-300 Joint Venture's right to due process. The Fifth Amendment to the United States Constitution provides that "no person shall...be deprived of life, liberty, or property without due process of law." Due process requires adequate notice and opportunity to be heard be given before a person can be deprived of his property. *Connell v. Shoemaker,* 555 F.2d 483 (5th Cir. 1977). Rule 65, Fed. R. Civ. P., provides a process by which a person can delay the taking of his property in order to be fully heard when the taking of the property would result in irreparable injury. If 12 U.S.C. § 1821(j) prevents a court from enjoining the RTC from conducting a foreclosure sale, as interpreted by the district court and the Fifth Circuit, this would deprive 281-300 Joint Venture and other property owners of their right to be heard before their property is taken.

Such an interpretation of § 12 U.S.C. § 1821(j) would also deny 281-300 Joint Venture the equal protection afforded by Rule 65(a) and the principles of equity in violation of the Fifth Amendment. Although the Fifth Amendment does not contain the words "equal protection" the

basic concepts of equal protection apply to the federal government through the due process clause of this amendment. *Mathews v. de Castro,* 429 U.S. 1981 (1976); *United States v. Hawes,* 529 F.2d 472 (5th Cir. 1976). The concept of equal protection means subjection to equal laws applying alike to all in a same situation. *Mahone v. Addicks Utility District of Harris County,* 536 F.2d 921 (5th Cir. 1988).

Section 1821(j) creates a class of people who cannot take advantage of Rule 65(a) and the principles of equity to prevent the taking of their property prior to a hearing on the merits of their case if the ruling of the district court is allowed to stand. In every situation, except when it is the RTC seeking to foreclose on property, a person can resort to equitable principles and Rule 65(a) to delay the taking of their property until final determination has been made on the merits of their lawsuit. *See Bean v. Independent American Savings Ass'n,* 838 F.2d 739 (5th Cir. 1988). To foster this distinction would be to deny 281-300 Joint Venture, and others so situated, equal protection of the law.

Section 1821(j) as interpreted by the courts below, further violates the separation of power set out in the United States Constitution by allowing Congress to render ineffective the principles of equity and the application of Rule 65(a) as developed by the courts.

CONCLUSION

Appellant 281-300 Joint Venture, respectfully submits that the district court erred in dismissing this case on prudential grounds and in refusing to enjoin RTC as conservator of SASA, F.A. from conducting the foreclosure sale. 281-300 Joint Venture respectfully prays that their petition be granted and that this Court reverse the judgment of the district court, to set aside the foreclosure sale, to place the parties in their respective positions prior to the foreclosure sale, to grant the preliminary injunction, and to allow this case to proceed on its merits, and for such other and further relief, at law or in equity, as this Court may determine appropriate.

Respectfully submitted,

Joe K. Longley

281-300 JOINT VENTURE, Petitoner

APPENDIX A

281-300 JOINT VENTURE,
Plaintiff-Appellant,

v.

Robert F. ONION, Substitute Trustee,
and San Antonio Savings Association,
Defendants-Appellees.

No. 90-5628

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

June 12, 1991.

Appeal was taken from decision of the United States District Court for the Western District of Texas at San Antonio, H.F. Garcia, J., denying motion for preliminary injunction prohibiting foreclosure sale of property and dismissing action against insolvent thrift on prudential grounds and against substitute trustee on mootness grounds. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that: (1) district court properly relied upon Federal Home Loan Bank Board (FHLBB) determination of worthlessness in dismissing suit against thrift, and (2) district court lacked the ability to enjoin nonjudicial foreclosure that was within statutorily authorized powers of Resolution Trust Corporation (RTC) as conservator.

Affirmed.

Joe K. Longley, Timothy R. Labadie, Longley & Maxwell, Austin, Tex., for plaintiff-appellant.

Wm. M. McNaught, Fred Riley Jones, San Antonio, Tex., Kirk K. Van Tine, Jesse R. Adams, III, Baker & Botts, Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Western District of Texas.

Before JOHNSON, SMITH, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The plaintiff, 281-300 Joint Venture (Joint Venture), appeals a decision of the district court denying its motion for a preliminary injunction prohibiting the foreclosure sale of its property and dismissing its action against San Antonio Savings Association (SASA) on prudential grounds pursuant to *Triland Holdings & Co. v. Sunbelt Serv. Corp.*, 884 F.2d 205 (5th Cir.1989), and its progeny, and further dismissing its action against Robert F. Onion, as substitute trustee, on mootness grounds. On appeal, Joint Venture maintains that the court (1) should not have dismissed the case on prudential grounds and (2) should have enjoined the Resolution Trust Corporation (RTC), as conservator of San Antonio Savings Association, F.A. (new SASA), from conducting the foreclosure sale. Finding no error, we affirm.

I.

On December 28, 1987, Joint Venture entered into a wrap-around loan from SASA, in the amount of $8,100,000, for the development of 296.69 acres of land in Bexar

County, Texas. The loan was evidenced by a note, loan agreement, and deed of trust. At the time of the loan, the property was encumbered by two superior liens. Pursuant to the loan agreement, SASA agreed to make advances to or for the benefit of Joint Venture for principal and interest on the underlying notes and for a certain percentage of each interest payment due on the SASA note. The loan agreement further obligated Joint Venture to pay the remaining interest on the SASA note with funds other than the proceeds of the loan; it provided that, in the event of non-payment, SASA had the right to foreclose on the property.

Joint Venture claims that on January 2, 1989, SASA failed to make an annual timely payment on one of the underlying notes. Shortly thereafter, the holder of that note declared it in default and posted the property for foreclosure. At the time of this event,[1] Joint Venture avers that it was current in its obligations and not in breach of the loan agreement. SASA, however, maintains that, beginning in January 1989, Joint Venture failed to make interest payments when due. SASA contends that as of November 30, 1989, Joint Venture had failed to make interest payments totaling approximately $160,000.

On February 28, 1989, the Federal Home Loan Bank Board (FHLBB) determined that SASA was insolvent and appointed the Federal Savings and Loan Insurance Corporation (FSLIC) as conservator, and later as receiver, of the thrift. In its role as receiver, the FSLIC took possession of all the assets of SASA and succeeded to all of its rights, titles, powers, and privileges. It was also directed to

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[1] The plaintiff claims that the breach of the loan agreement by SASA resulted in SASA's being elevated to a first lien position, caused injury to Joint Venture's credit reputation and standing in the community, and shortened the term of one of the notes.

liquidate the claims against SASA.

As a result, according to federal regulations and state law, if the assets of the failed institution were insufficient to pay depositors in full, general unsecured creditors who were in a lower priorityclass were not entitled to be paid anything. *See* Tex.Rev.Civ.Stat.Ann. art. 852a, § 8.09(g)(2), (3), (4) (Vernon Supp.1991). Since the FHLBB determined that SASA did not have enough assets to satisfy the depositors in full, the claims of general unsecured creditors such as Joint Venture could not be satisfied.

Approximately four months later, the FHLBB created new SASA and appointed the FSLIC as conservator; the FSLIC was responsible for liquidating SASA's assets by transferring them to new SASA. In consideration for receiving such assets, new SASA agreed to assume SASA's liabilities for tax claims, its liabilities to depositors to the extent of their deposits, and its liabilities to secured creditors to the extent of the value of their security.

New SASA did not agree, however, to assume any liability for claims by SASA's general unsecured creditors. While the loan agreement, note, and deed of trust executed by Joint Venture to SASA were transferred to new SASA, along with the right of collection or foreclosure, none of the liabilities for Joint Venture's claims against SASA was assumed by new SASA. Instead, the claims relating to SASA's conduct remained as claims against the FSLIC as receiver for SASA. After the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub.L. No. 101-73, 103 Stat. 183 (1989), abolished the FSLIC, the RTC succeeded the FSLIC as receiver for SASA and as conservator for new SASA.[2]

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[2] The RTC later was appointed as receiver for new SASA.

II.

On June 30, 1989, Joint Venture filed suit in state district court, seeking a temporary restraining order (TRO) and a permanent injunction to prevent the FSLIC as conservator for SASA from foreclosing on the property that served as security for its loan. That day, Joint Venture secured a TRO restraining SASA and its substitute trustee, Onion, from conducting a foreclosure on the property.

Two weeks later, the case was removed to federal district court. Then, the property again was posted for foreclosure, this time by the RTC, acting as conservator for new SASA. The sale did not take place, however, as Joint Venture had filed a chapter 11 bankruptcy petition. On October 31, 1989, at the request of the RTC as conservator for new SASA, the bankruptcy court granted a motion to lift the stay, leaving no impediment to proceeding to a foreclosure sale.

In response, Joint Venture filed a motion for a preliminary injunction in district court on November 17, 1989. The court denied this motion and found that it was prohibited by section 212(j) of FIRREA, 12 U.S.C. § 1821(j), from taking any action to restrain or affect the powers or functions of the RTC as conservator of new SASA. A few days later, the RTC foreclosed on the lien.

On June 27, 1990, the RTC, as receiver for SASA, filed a motion to dismiss on prudential grounds, relying upon the FHLBB's determination of worthlessness. Joint Venture filed no response. The court then held that there would never be any assets with which to satisfy a judgment and granted RTC's motion. It also dismissed, as moot, the claims against Onion, as the property had been sold.

III.

[1] Joint Venture contends that, for two reasons, the court should not have dismissed this case on prudential grounds. First, it maintains that the RTC did not offer any evidence of the value of SASA's assets, thereby precluding a finding that it would be impossible for Joint Venture to collect on a favorable judgment for monetary damages. Second, even if Joint Venture would not have been able to collect any money, it argues that the court could have granted equitable relief and declared the rights of the parties. We disagree with both contentions.

The RTC presented sufficient evidence to demonstrate that SASA will never have any assets to satisfy a judgment against it by Joint Venture. The FHLBB determined that SASA's assets would be insufficient to satisfy its secured and deposit liabilities and that, after payment of the claims of secured creditors and depositors, "no amount remains for payment of general creditors ... and therefore, the Association's [SASA's] general creditors' claims ... are worthless...."[3] FHLBB Resolution No. 89-1769P, at 4 (July 12, 1989).

While the FHLBB's findings and conclusions regarding the worthlessness of unsecured creditor claims constitute final agency action, they are subject to review under the Administrative Procedure Act (APA). *See* 5 U.S.C. §§ 702-706. Joint Venture, however, never sought judicial review of the FHLBB's determination of worthlessness. In-

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[3] In addition, the RTC correctly argued that Joint Venture cannot look to new SASA as a source of recovery, as it did not assert any claim in its complaint against the RTC as conservator for this new thrift. Also, as we have noted, the potential liabilities to unsecured creditors of SASA were not assumed by new SASA. Thus, Joint Venture had no right to assert any claim against SASA's transferred assets. *See Gulley v. Sunbelt Sav., F.S.B.*, 902 F.2d 348, 351 (5th Cir. 1990), *cert. denied*, ____U.S.____, 111 S.Ct. 673, 112 L.Ed.2d 665 (1991).

stead, it argues that the determination alone is insufficient to prove that there will never be any assets in the receivership to satisfy the claims of unsecured creditors. Previously we have determined that such a collateral attack on the FHLBB's determination is improper and that, absent evidence to the contrary, we are bound by its decision. *See Gulley,* 902 F.2d at 351 n. 4.

The RTC also adequately demonstrates that a court, bound by the FHLBB's determination of worthlessness, would have no reason to grant equitable relief for Joint Venture or to declare the rights of the parties. Indeed, the RTC already has shown that Joint Venture, as an unsecured general creditor, has no right to any of SASA's or new SASA's assets and that the new thrift has not assumed any of the liabilities of its predecessor emanating from the loan agreement with Joint Venture. Since Joint Venture has not mentioned any other rights that it is entitled to receive in connection with this loan, the court had no reason to grant it equitable relief. *See FSLIC v. Hall Whispertree Assocs.,* 653 F.Supp. 148, 150 (N.D.Tex. 1986).

Thus, the court was correct in relying upon the FHLBB's decision, to the effect that there will never be any assets with which to satisfy a judgment by Joint Venture against SASA, in its determination to dismiss, on prudential grounds, Joint Venture's suit against this failed thrift. *See Triland,* 884 F.2d at 208 (where no means exist to collect on judgment, dismissal on prudential grounds is proper); *Adams v. RTC,* 927 F.2d 348, 354 (8th Cir.1991) (FHLBB's determination of worthlessness is sufficient to support dismissal on ground of prudential mootness); *accord Morgan v. Heights Sav. Ass'n,* 741 F.Supp. 620, 621 (E.D.Tex.1990); *FSLIC v. Locke,* 718 F.Supp. 573, 586 (W.D.Tex.1989).

IV.

[2] Joint Venture also argues that the court's refusal to enjoin the RTC, as conservator of new SASA, from conducting the foreclosure sale was improper. It maintains that section 212(j) of FIRREA should not be read to grant conservators broad powers to act quickly in dealing with the assets of failed thrifts, especially where such actions involve foreclosing on property of owners who have a substantial likelihood of prevailing on the merits of the case and who may suffer irreparable injury from the foreclosure. *See Libertarian Party v. Fainter,* 741 F.2d 728, 729 (5th Cir.1984). Joint Venture further asserts that the refusal to enjoin the foreclosure was unconstitutional. Both arguments are unpersuasive.

The court properly refused to enjoin the RTC from conducting the foreclosure. Section 212(j) states that "no court may take any action ... to restrain or affect the exercise of powers or functions of the Corporation [RTC] as a conservator or a receiver." Prior to the enactment of FIRREA, the Federal Deposit Insurance Act contained a similar provision that was created to enable the FSLIC to act in a quick and decisive manner in reorganizing, operating, or dissolving failed savings and loan institutions. *See North Miss. Sav. & Loan Ass'n v. Hudspeth,* 756 F.2d 1096, 1101 (5th Cir.1985), *cert. denied,* 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986). Since this policy has not been changed with the enactment of FIRREA, the courts lack the ability to enjoin nonjudicial foreclosures that are within the statutory powers of the RTC as conservator or receiver. *Hall,* 653 F.Supp. at 150.

In this case, the foreclosure was within the statutorily authorized powers of the RTC as conservator. While Joint Venture argues that this foreclosure was not within

the "powers or functions" of the RTC as conservator of new SASA that are protected from collateral attacks by section 212(j) and its predecessor, 12 U.S.C. § 1464(d)(6)(C), the RTC correctly cites to *Coit Indep. Joint Venture v. FSLIC,* 489 U.S. 561, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989), to demonstrate that its actions were within this category.

In *Coit,* the Court stated that a court may not grant injunctive relief unless the power or function whose exercise is sought to be enjoined is beyond the powers granted to the RTC by statute. *Id.* at 574, 109 S.Ct. at 1369. The function under consideration here is the ability of the conservator to foreclose on the property of a debtor, a power that Congress gave to the RTC under FIRREA. Indeed, when the RTC acts as a conservator or receiver, it has broad authority to dispose of assets and to "collect all obligations and money due the [failed] institution." 12 U.S.C. § 1821(d)(2)(B)(ii).[4] Hence, the court may not enjoin the exercise of the RTC's powers in this instance, *see Shoreline Group, Ltd. v. Commonwealth Fed. Sav. & Loan Ass'n,* No. 90-6703-CIV (S.D.Fla. Feb. 14, 1991), regardless of Joint Venture's likelihood of success on the underlying claims.[5] *See Abbott Bldg. Corp. v. FSLIC,* 739 F.Supp. 532, 535 (D.Nev.1990).

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[4] *See also* 12 U.S.C. § 1821(d)(2)(B)(iv) (RTC empowered to "preserve and conserve the assets and property of such institution"); 12 U.S.C. § 1821(d)(2)(D)(i) (RTC authorized to "put ... institution in sound and solvent condition ...").

[5] The anti-injunction provision of 12 U.S.C. § 1464(d)(6)(C) has been upheld on constitutional grounds. *See Haralson v. FHLBB,* 837 F.2d 1123, 1126 (D.C.Cir.1988); *Biscayne Fed. Sav. & Loan Ass'n v. FHLBB,* 720 F.2d 1499, 1503-04 (11th Cir.1983), *cert. denied,* 467 U.S. 1215, 104 S.Ct. 2656, 81 L.Ed.2d 363 (1984).

Finally, Joint Venture's various claims that the court's denial of injunctive relief was unconstitutional are meritless. Accordingly, we AFFIRM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
AUG 15 1990

281-300 JOINT VENTURE,	§	
	§	
Plaintiff	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. 89CA0908
	§	
ROBERT F. ONION,	§	
SUBSTITUTE TRUSTEE AND	§	
SAN ANTONIO SAVINGS	§	
ASSOCIATION,	§	
	§	
Defendant	§	

ORDER

On this day came to be heard Plaintiff's Motion for Reconsideration of the Court's dismissal of the action on prudential grounds. Having reviewed the Motion, the response, and the authorities cited, the Court is of the opinion that Plaintiff's Motion should be and the same is hereby denied. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Reconsideration is DENIED.

SIGNED this 15th day of August, 1990.

/s/ H.F. Garcia

H.F. GARCIA,
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF
TEXAS-SAN ANTONIO DIVISION

FILED
JUL 31 1990

281-300 JOINT VENTURE,
plaintiff,

JUDGMENT IN
A CIVIL CASE

V.

ROBERT F. ONION,
SUBSTITUTE TRUSTEE AND
SAN ANTONIO SAVINGS
ASSOCIATION,

CASE NUMBER:
SA 89 CA 908

defendants.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED AND DECREED that the above action be dismissed on prudential grounds pursuant to *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir. 1989)and its progeny. *See also Cox v. Sunbelt Savings Assoc. of Texas,* 896 F.2d 957, 959 (5th Cir. 1990). After further review of the pertinent

pleadings, the claims against defendant Robert F. Onion, Substitute Trustee, are hereby dismissed as moot in view of the Court's earlier denial of the motion for preliminary injunctive relief and the property's subsequent sale.

July 31, 1990	/s/CHARLES W. WAGNER
Date	Clerk
	/s/ Rosanne Glozano
	(By) Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
JUL 31 1990

281-300 JOINT VENTURE,	*	
	*	
Plaintiff,	*	
	*	
V.	*	SA-89-CA-908
	*	
ROBERT F. ONION,	*	
SUBSTITUTE TRUSTEE AND	*	
SAN ANTONIO SAVINGS	*	
ASSOCIATION,	*	
	*	
Defendants.	*	

ORDER

On this date came to be considered the motion for dismissal on prudential grounds by defendant Resolution Trust Corporation in its capacity as Receiver for San Antonio Savings Association. After reviewing the motion to which no response has been filed, the brief filed by defendant, and the pertinent authorities, the Court is of the opinion and finds that the Resolution Trust Corporation in its capacity as Receiver for San Antonio Savings Association is entitled to the relief sought because the supporting documentation shows that there will now never be any assets with which to satisfy a judgment.

It is, therefore, ORDERED, ADJUDGED AND DECREED that the above action be dismissed on prudential grounds pursuant to *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir. 1989) and its progeny.

See also Cox v. Sunbelt Savings Assoc. of Texas, 896 F.2d 957, 959 (5th Cir. 1990). After further review of the pertinent pleadings, the claims against defendant Robert F. Onion, Substitute Trustee, are hereby dismissed as moot in view of the Court's earlier denial of the motion for preliminary injunctive relief and the property's subsequent sale.

SIGNED this 31st day of July, 1990.

/s/ H.F. Garcia

H. F. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX E

~~IN~~ THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED
DEC 01 1989

281-300 JOINT VENTURE,	*	
	*	
Plaintiff,	*	
	*	
V.	*	SA-89-CA-908
	*	
ROBERT F. ONION, and SAN ANTONIO SAVINGS ASSOCIATION,	*	
	*	
Defendants.	*	

ORDER

Plaintiff's motion for preliminary injunction was heard on November 30, 1989. Plaintiff asks this Court to enjoin San Antonio Savings Association (SASA), F.A. and Robert Onion, Substitute Trustee, from foreclosing upon plaintiff's property on December 5, 1989. Resolution Trust Corporation (RTC), Conservator for SASA, F.A. asserts that this Court lacks the power to interfere with RTC's nonjudicial foreclosure. After considering the parties' relevant motions, along with the entire file, the Court denies plaintiff's motion for preliminary injunction.

Section 212(j) of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) states that no court may take any action to restrain or affect the exercise of powers or functions of the Corporation (RTC) as a conservator or receiver. The nonjudicial foreclosure scheduled for December 5, 1989 constitutes an exercise of power of

the RTC as a conservator for SASA, F.A. Federal statute thus prohibits this Court from restraining the scheduled foreclosure.

Prior to the enactment of FIRREA, the Federal Deposit Insurance Act contained a virtually identical provision, the purpose of which was to enable the FSLIC to act quickly and decisively in reorganizing, operating or dissolving a failed institution. *North Mississippi Savings & Loan Ass'n v. Hudspeth,* 756 F.2d 1096, 1101 (5th Cir. 1985), *cert. denied,* 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986). This policy has not been changed by the enactment of FIRREA. Where a party sought to enjoin the FSLIC from conducting a nonjudicial foreclosure on their property, the court lacked the power to interfere with FSLIC's foreclosure and denied the party's application for preliminary injunction without reaching the merits. *Federal Savings and Loan Insurance Corporation v. Hall Whispertree Associates,* 653 F.Supp. 148, 150 (N.D. Tex. 1986).

Plaintiff's attempt to avoid application of Section 212 because SASA, F.A. is not a failed institution and plaintiff's constitutional assault on Section 212 of FIRREA are not convincing. Plaintiff's motion for preliminary injunction is denied.

SIGNED this 1st day of December, 1989.

/s/ H.F. Garcia

H. F. GARCIA
UNITED STATES DISTRICT JUDGE

APPENDIX F

Reversed and Remanded and Opinion
Filed September 5, 1991

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-90-01562-CV

EARL J. GIBBS,

Appellant

V.

BANK ONE, TEXAS, N.A., f/k/a,
DEPOSIT INSURANCE BRIDGE BANK,

Appellee

On Appeal from the 193rd Judicial District Court
Dallas County, Texas
Trial Court Cause No. 89-01676-L

O P I N I O N

Before Justices Stewart, Baker, and Kinkeade
Opinion By Justice Kinkeade

Earl J. Gibbs appeals a judgment in favor of Bank One, Texas, N.A. ("Bank One") in this suit on three promissory notes. In fifty-eight points of error, Gibbs contends (1) that the trial court erred when it granted Bank One's

motion for summary judgment and ordered that he take nothing on his counterclaims, and (2) that Bank One's supporting affidavits and exhibits are insufficient summary judgment evidence. Because genuine issues of material fact remain regarding Gibb's counterclaims, we reverse the trial court's judgment and remand this cause for further proceedings.

PROCEDURAL HISTORY

On August 11, 1986, Gibbs executed a variable interest rate promissory note for $500,000 in favor of MBank Market Center. On December 1, 1986, MBank Market Center merged with MBank Dallas, and the surviving bank became MBank Dallas, N.A. (MBank). On January 15, 1988, Gibbs excuted a second variable interest rate promissory note for $483,290 in favor of MBank. Each of the two notes executed by Gibbs was secured by deeds of trust to real estate and to personal property.

Gibbs later defaulted on the notes. MBank foreclosed on the real estate and personal property, which sold at a foreclosure sale for less than the amounts due under the notes, leaving deficiencies. On February 8, 1989, MBank sued Gibbs for the remaining deficiencies on the notes. Gibbs defended against the deficiency suit by pleading various general and verified denials, affirmative defenses, and special pleas. Further, Gibbs raised several counterclaims against MBank, including (1) breach of contract, (2) breach of duty of good faith and fair dealing, (3) wrongful foreclosure, (4) violation of article 2148(a) of the Texas Insurance Code, and (5) declaratory relief.

On March 28, 1989, MBank was declared insolvent and the Federal Deposit Insurance Corporation (FDIC) assumed control as receiver. The FDIC then established

the Deposit Insurance Bridge Bank, N.A. (DIBB) and transferred MBank's assets, including the notes executed by Gibbs, to the DIBB under a purchase and assumption agreement. The DIBB subsequently changed its name to Bank One and was substituted as a party in this suit. Bank One moved for summary judgment and alleged that the federal holder in due course doctrine, the *D'Oench, Duhme* rule of estoppel, and estoppel under 12 U.S.C. § 1823(e) barred all of Gibbs's claims and defenses. Bank One further alleged that no genuine issue of material fact remained because all of Gibbs's claims and defenses failed under Texas law.

In response, Gibbs argued that the federal holder in due course doctrine should not apply in this case because both promissory notes were non-negotiable instruments. Gibbs further argued that Bank One failed to carry its summary judgment burden and genuine issues of material fact remain as to Bank One's claims, his counterclaims, and his affirmative defenses. On August 3, 1990, the trial court granted Bank One's motion for summary judgment and denied Gibbs's counterclaims.

STANDARD OF REVIEW

This Court will affirm the summary judgment only if the record establishes that the movant, Bank One, has conclusively proved all essential elements of its cause of action *or defense* as a matter of law. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); Tex. R. Civ. P. 166a(c). Bank One had the burden of proof to show that there are no genuine issues of material fact and that it was is (sic) entitled to judgment as a matter of law. *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 300-01 (Tex. 1990). This Court takes evidence favorable to the non-movant, Gibbs, as true when deciding whether a material

fact issue exists. *Id.* Further, we indulge all reasonable inferences and resolve any doubts in Gibbs's favor. *MMP, Ltd. v. Jones,* 710 S.W.2d 59, 60 (Tex. 1986).

The Federal Holder in Due Course Doctrine and Non-Negotiable Instruments

In his first point of error, Gibbs contends that the trial court erred when it granted Bank One's motion for summary judgment and ordered that he take nothing on his counterclaims. Gibbs argues that Bank One's summary judgment evidence was insufficient to establish its federal holder in due course defense as a matter of law. Gibbs further argues that the federal holder in due course doctrine could not bar his counterclaims and affirmative defenses because the doctrine does not apply to non-negotiable instruments.

Article Three of the Uniform Commercial Code (UCC) sets out the requisites for the negotiability of an instrument. *Hinckley v. Eggers,* 587 S.W.2d 448, 450 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *see* Tex. Bus. & Com. Code Ann. § 3.104 (Tex. UCC) (Vernon 1968). A negotiable instrument, such as a note, is a writing signed by the maker, containing an unconditional promise to pay a sum certain in money, on demand or at a definite time, to order or to bearer. Tex. Bus. & Com. Code Ann § 3.104 (Tex. UCC) (Vernon 1968). An amount contained in an instrument is not a "sum certain" within section 3.104(a)(2) if such amount can be determined only from sources outside the instrument. *See Hinckley,* 587 S.W.2d at 451. Further, if a note provides for a variable interest rate tied to a fluctuating "base rate" established by a bank, it is not a "negotiable instrument" as defined by the UCC. *Lexington Ins. Co. v. Gray,* 775 S.W.2d 679, 682 (Tex. App.—Austin

1989, writ denied); *see* Tex. Bus. & Com. Code Ann. § 3.104(a) (Tex. UCC) (Vernon 1968).

The summary judgment evidence shows that both promissory notes in this case provide for variable interest rates that can be determined only from sources outside of the notes. The first note provides for a variable interest rate tied to a fluctuating "base rate" established by the bank. The second note provides for a variable interest rate tied to a fluctuating "prime rate" established by the bank. Because the amounts due under the notes are not a "sum certain" and can only be determined from sources outside of the notes, the notes are not negotiable instruments. *See* Tex. Bus. & Com. Code Ann. § 3.104(a)(2) (Tex. UCC) (Vernon 1968). Having determined that the notes acquired by Bank One are non-negotiable, we must consider whether the federal holder in due course doctrine protects Bank One, a successor of the FDIC, from Gibbs's defenses and counterclaims.

To meet the technical requirements of Texas law for holder in due course status, a holder of a negotiable instrument must (1) take the instrument for value, (2) in good faith, and (3) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person. Tex. Bus. & Com. Code Ann. § 3.302(a) (Tex. UCC) (Vernon 1968). Further, if the holder acquires the instrument as part of a bulk transaction, rather than in the regular course of business of the transferor, the holder does not meet the technical requirements of Texas law for holder in due course status. Tex. Bus. & Com. Code Ann. § 3.302(c)(3) (Tex. UCC) (Vernon 1968). The FDIC and its successors, however, may be holders in due course under federal common law without meeting the technical requirements of state law for holder in due course status. *See NCNB Texas Nat'l Bank v. Campise,* 788 S.W.2d 115, 118

(Tex. App.—Houston [14th Dist.] 1990, writ denied). The federal holder in due course doctrine bars makers of *negotiable instruments* from asserting personal defenses to liability against the FDIC where it acquires the instrument in a purchase and assumption transaction involving troubled financial institutions. *See FDIC v. Byrne,* 736 F. Supp. 727, 730 (N.D. Tex. 1990). The federal holder in due course doctrine further precludes assertion of personal defenses against a transferee of the FDIC who acquires a *negotiable instrument* for value, in good faith, and without notice of any defense. *See id.*

The Fifth Circuit recently addressed the issue of whether the federal holder in due course doctrine protects the FDIC or its successors from personal defenses asserted by the makers of non-negotiable instruments. *Sunbelt Savings, FSB Dallas, Texas v. Montross,* 923 F.2d 353 (5th Cir. 1991) (reh'g granted). *Montross* involved the execution of a variable interest note in favor of Sunbelt Savings. Montross defaulted on the note. Sunbelt foreclosed on the note, purchased the security at the foreclosure sale, and then filed suit against Montross for the deficiency. Shortly after filing suit, Sunbelt failed and the FDIC assumed control. The court in *Montross* held the following:

> We do not view negotiability as a technical requirement. Negotiability is the foundation underlying all of Article Three and of holder in due course status in particular.... When the negotiable note is in the hands of a holder in due course, the maker is left with few defenses, thus, the instrument's value is enhanced. Non-negotiable instruments, however, are contractual obligations, which do not enjoy holder in due course protections. The makers of variable interest rate notes sign only a contractual obligation to repay their debt; they had no expectation

> that holder in due course doctrine would strip them of their defenses.
>
> Extending holder in due course status to the FDIC and its successors respecting non-negotiable instruments is both unnecessary and undesirable. When the FDIC assumes control of an institution, the assets are what they are — negotiable instruments, contracts, real property, and so on. We agree that the FDIC should not be disadvantaged by the circumstances of its assumption of control, but this policy does not require giving the FDIC the ability to transmute lead into gold. Allowing the FDIC to transform contracts into negotiable instruments would defeat the reasonable commercial expectations of the variable interest note makers.

Montross, 923 F.2d at 356.

We agree with the reasoning of the Fifth Circuit. Therefore, we conclude that extending holder in due course status to the FDIC and its successor, Bank One, thus extending federal holder in due course protection to non-negotiable instruments in this case, would bestow a benefit on the FDIC and its successor by changing the nature of the assets received from MBank and enhancing the assets' value. The trial court erred by using the federal holder in due course defense to bar Gibbs's defenses and counterclaims.

Having concluded that Bank One's federal holder in due course defense does not bar Gibbs's defenses and counterclaims, we consider whether the summary judgment evidence establishes that Bank One has conclusively proved all essential elements of its cause of action *or defense* as a matter of law. *City of Houston*, 589 S.W.2d at 678. The summary judgment evidence in this case shows

that Bank One could not establish its federal holder in due course defense as a matter of law. Further, Bank One's summary judgment evidence failed to disprove an essential element of each of Gibbs's counterclaims. Because Bank One failed to (1) conclusively establish its federal holder in due course defense as a matter of law or (2) disprove an essential element of each of Gibbs's counterclaims, genuine issues of fact remain regarding Gibbs's counterclaims. We sustain Gibbs's first point of error.

Because of our disposition of Gibbs's first point of error, we need not address his remaining points. We reverse the trial court's judgment and remand this cause for further proceedings.

/s/ Ed Kinkeade

ED KINKEADE
JUSTICE

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